

CHAPTER 35

NEW JERSEY GROSS INCOME TAX

Authority

N.J.S.A. 54:50-1, 54A:9-8.2 and 54A:9-17(a).

Source and Effective Date

R.2003 d.285, effective June 20, 2003.
See: 35 N.J.R. 1384(a), 35 N.J.R. 3386(a).

Chapter Expiration Date

Chapter 35, New Jersey Gross Income Tax, expires on June 20, 2008.

Chapter Historical Note

Chapter 35, New Jersey Gross Income Tax, was adopted prior to September 1, 1969.

Subchapter 2, Setoff of Individual Liability, was adopted as R.1982 d.161, effective May 17, 1982. See: 13 N.J.R. 940(a), 14 N.J.R. 474(b).

Pursuant to Executive Order No. 66(1978), Chapter 35, New Jersey Gross Income Tax, was readopted as R.1983 d.353, effective August 12, 1983. See: 15 N.J.R. 1091(a), 15 N.J.R. 1488(c).

Pursuant to Executive Order No. 66(1978), Chapter 35, New Jersey Gross Income Tax, was readopted as R.1988 d.299, effective June 7, 1988. See: 20 N.J.R. 514(a), 20 N.J.R. 1571(b).

Pursuant to Executive Order No. 66(1978), Chapter 35, New Jersey Gross Income Tax, was readopted as R.1993 d.315, effective June 4, 1993. See: 25 N.J.R. 1500(a), 25 N.J.R. 2906(b).

Former Subchapter 3, Information Return for Business Employment Incentive Program/Business Relocation Assistance Grant Program of the New Jersey Economic Development Authority, was adopted as R.1997 d.533, effective December 15, 1997. See: 29 N.J.R. 4076(b), 29 N.J.R. 5313(a).

Pursuant to Executive Order No. 66(1978), Chapter 35, New Jersey Gross Income Tax, was readopted as R.1998 d.195, effective March 26, 1998. See: 30 N.J.R. 612(a), 30 N.J.R. 1428(a).

Chapter 35, New Jersey Gross Income Tax, was readopted as R.2003 d.285, effective June 20, 2003. See: Source and Effective Date. See, also, section annotations.

Subchapter 2, Excludable Income, was renamed Exclusions and Deductions by R.2007 d.55, effective February 5, 2007. See: 38 N.J.R. 4658(a), 39 N.J.R. 546(a).

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SUBCHAPTER 1. GROSS INCOME—CATEGORIES AND CALCULATION

18:35-1.1 Net profits from business

(a) Each taxpayer is subject to gross income tax on the taxpayer's "net profits from business" within the meaning of N.J.S.A. 54A:5-1b, which shall be determined as provided in this subchapter.

(b) For purposes of the Gross Income Tax Act, a sole proprietorship, which shall include self-employed individuals and independent contractors, is a form of business in which one taxpayer owns all the assets of a business and which is not a partnership or corporation. A single member limited liability company whose member is an individual, estate, or trust shall be treated as a sole proprietorship, unless classified otherwise for Federal tax purposes. Sole proprietors shall report their income or loss as net profits from business.

(c) A taxpayer's net profits from business shall be determined by taking into account all income of the taxpayer derived from the conduct of a business, profession or any other activity intended to produce income, provided such activity qualifies for and reports as a trade or business for Federal income tax purposes. All income attributable to the taxpayer's conduct of a trade or business, reduced by costs and expenses as provided in (d) below, shall be taken into account in determining the taxpayer's net profits from business. All other income of the taxpayer subject to gross income tax that is not attributable to the conduct of a trade or business shall be included in one or more of the other categories of gross income specified in N.J.S.A. 54A:5-1 according to its character and shall not be includable in the category of income "net profits from business." The determination of whether income is derived from the conduct of a trade, business or profession shall be based upon an examination of facts and circumstances of the taxpayer's activities.

1. Income derived as remuneration for services rendered in the sole proprietorship's conduct of a trade or business shall be taken into account in determining a self-employed taxpayer's net profits from business. Income derived by a taxpayer in the taxpayer's capacity as an employee, as defined in N.J.A.C. 18:35-7.1, shall not be taken

into account in determining the taxpayer's net profits from business, but rather shall be taxed under N.J.S.A. 54A:5-1a (salaries, wages, etc.).

2. Interest and dividend income derived by a taxpayer in the conduct of a trade or business shall be taken into account in determining a taxpayer's net profits from business. The taxpayer shall annex to the taxpayer's return a statement demonstrating that the interest or dividends were realized in the conduct of the trade or business. Interest and dividends from investment activities or other income-producing activities which do not constitute the conduct of a trade or business shall be separately stated on the taxpayer's return and taxed either as interest described in N.J.S.A. 54A:5-1e or dividends described in N.J.S.A. 54A:5-1f.

3. Rental income derived by a taxpayer in the conduct of a trade or business shall be taken into account in determining a taxpayer's net profits from business. Rental income of a taxpayer which is not received in the conduct of a trade or business shall be taken into account in determining the taxpayer's net gains or net income from rents, royalties, patents and copyrights described in N.J.S.A. 54A:5-1d.

4. Royalty, patent, or copyright income derived by a taxpayer in the conduct of a trade or business that licenses intangible property shall be taken into account in determining the taxpayer's net profits from business. Income derived from royalties, patents or copyrights of a taxpayer which is not derived from a trade or business shall be taken into account in determining the taxpayer's net gains or net income from or in the form of rents, royalties, patents and copyrights described in N.J.S.A. 54A:5-1d.

5. Gains from the sale, exchange or other disposition of trade or business property shall be taken into account in determining a taxpayer's net profits from business. The taxpayer shall annex to the taxpayer's return a statement which demonstrates that gains and losses from the sale, exchange, or other disposition of property were realized in the conduct of a trade or business. The sale, exchange or other disposition of property which is not directly related to or employed in the conduct of a trade or business must be reported as described in N.J.S.A. 54A:5-1c, net gains or income from the disposition of property. Gain or loss from the sale or disposition of assets employed in a trade or business as a result of a complete liquidation of the business must be reported as described in N.J.S.A. 54A:5-1c, net gains or income from the disposition of property.

i. A complete liquidation of a business is deemed to occur in the tax year when the business discontinues all business activities and all its assets have been distributed.

6. A taxpayer's distributive share of income or loss from a partnership, S corporation, or estate or trust shall not be taken into account in determining a taxpayer's net profits from business, regardless of the character of the in-

<u>Income</u>		
Business interest	\$50	
Gross receipts from hardware sales	\$250,000	\$250,050
<u>Expenses</u>		
Cost of goods sold	\$80,000	
Rent	\$20,000	
Supplies	\$2,000	
Utilities	\$1,800	
Insurance	\$1,500	
Advertisement		
Yellow pages	\$200	
Local church bulletin	\$800	(\$106,300)
Net profits from business:		<u>\$143,750</u>

Taxpayer will report his income on his New Jersey gross income tax return as follows:

<u>Category</u>	<u>Amount</u>
Interest	\$300
Dividends	\$100
Net profits from business	<u>\$143,750</u>
New Jersey gross income:	<u>\$144,150</u>

Example 2:

Taxpayers are a married couple living in New Jersey who file a joint gross income tax return. The wife, who is an insurance agent, is an employee of a large insurance company. The husband is a self-employed trader of securities (stocks, bonds, futures). The couple has income from the following sources:

<u>Non-business income</u>		<u>Business income</u>	
Wages	\$90,000	Interest	\$4,000
(from insurance co.)		Dividends	\$7,000
Interest	\$10,000	Gains on sale of securities	\$400,000
(from joint savings account)		Losses on sale of securities	(\$100,000)
Dividends	\$5,000		
(non business investments held by taxpayers)		Income earned by the husband as a "trader" in securities	
Loss on sale of stock	(\$70,000)		
(non business investments held by taxpayers)			
Gain on sale of undeveloped land	\$40,000		

Disbursements made by the husband as a trader in securities:

<u>Ordinary expenses—deductible</u>		<u>Nondeductible expenses</u>	
Investment interest expense	\$60,000*	Keogh	\$7,500**
Broker fees	\$5,000		
Home office expense	\$3,000		
Depreciation	\$2,000		
Meals/entertainment	\$500		
Journals/publications	\$200		

Disbursements made by the wife as an insurance agent:

Meals/entertainment	\$800***
Travel	\$600***

* Investment interest expense is deductible as an ordinary business expense if it is directly related to the production of business income by the business entity incurring the cost.

** The Keogh expenditure is not deductible as an ordinary business expense. Taxpayer is not an employee of the business.

*** The wife cannot deduct any expenses incurred in the performance of her duties as an insurance agent, in that she is an employee of the insurance company and not an independent contractor. See N.J.A.C. 18:35-1.21 and 1.23 for more detail.

The husband will calculate his net profits from business as follows:

<u>Income</u>		
Interest	\$4,000	
Dividends	\$7,000	
Gains from sale of securities	\$400,000	
Losses from sale of securities	<u>(\$100,000)</u>	\$311,000
<u>Ordinary expenses</u>		
Investment interest expense	\$60,000	
Broker fees	\$5,000	
Home office expense	\$3,000	
Depreciation	\$2,000	
Meals/entertainment	\$500	
Journals/publications	<u>\$200</u>	<u>(\$70,700)</u>
Net profits from business:		<u>\$240,300</u>

Taxpayers will report their income on their New Jersey gross income tax return as follows:

Wages	\$90,000
Interest	\$10,000
Dividends	\$5,000
Net profits from business	\$240,300
Net income from disposition of property	\$0 †
New Jersey gross income:	<u>\$345,300</u>
† Net income from disposition of property	
Loss on sale of stock	<u>(\$70,000)</u>
Gain on sale of undeveloped land	\$40,000
Net income from disposition of property:	<u>\$(30,000)</u>

Taxpayers cannot apply their loss on disposition of property against their income attributable to other categories of New Jersey gross income.

Example 3:

Taxpayers are a married couple living in New Jersey who file a joint gross income tax return. The husband is employed by a large medical firm. The wife operates a rental real estate business at the Jersey shore which she personally manages and reports on her Schedule C of their Federal return. The taxpayers also own a cabin in Killington, Vermont as an investment. They report the income from the cabin as rental income on their Federal return. The property in Vermont is managed by a realty company that handles all aspects of renting and maintaining the property. The couple has income from the following sources:

<u>Rental real estate business income</u>		<u>Non business income</u>	
Rental receipts	\$200,000	Wages from medical firm	\$100,000
Interest	\$500 †	Interest from investments	\$6,000
		Dividends from investments	\$5,000
		Rental receipts from VT property	\$12,000

† Interest earned on working capital

Disbursements made by the rental real estate business and by the taxpayers for the Vermont rental property:

<u>Rental real estate business</u>		<u>Vermont rental property</u>	
Ordinary expenses—deductible		Ordinary expenses—deductible	
Depreciation	\$22,000	Depreciation	\$4,000
Utilities	\$15,000	Utilities	\$800
Mortgage interest	\$13,000 *	Mortgage interest	\$6,000 *
Taxes	\$8,000	Taxes	\$5,200
Repairs	\$5,000	Commissions	\$1,000
Advertising	\$800		

* Interest paid to banks for the purchase of the rental properties.

Taxpayers will calculate their net profits from business and rental income as follows:

<u>Rental real estate business</u>			<u>Vermont rental property</u>		
Income			Income		
Rental receipts	\$200,000		Rental receipts	\$12,000	\$12,000
Interest	\$500	\$200,500	Ordinary expenses		
Ordinary expenses			Depreciation	\$4,000	
Depreciation	\$22,000		Utilities	\$800	
Utilities	\$15,000		Mortgage interest	\$6,000	
Mortgage interest	\$13,000		Taxes	\$5,200	
Taxes	\$8,000		Commissions	\$1,000	(\$17,000)
Repairs	\$5,000		Net rental income:		<u>(\$5,000)</u>
Advertising	\$800	(\$63,800)			
Net profits from business		<u>\$136,700</u>			

Taxpayers will report their income on their New Jersey gross income tax return as follows:

Wages	\$100,000
Interest	\$6,000
Dividends	\$5,000
Net profits from business	\$136,700
Net gains or income from rents, royalties, patents and copyrights	\$0 †
New Jersey gross income:	<u>\$247,700</u>

† Taxpayers cannot apply their rental loss of \$5,000 against income attributable to other categories of New Jersey gross income.

Example 4:

A New Jersey resident starts a sole proprietorship business, operating in New Jersey, with an original contribution of \$2,300. On December 31, 2005, she sells the business including all assets (office equipment and a truck). The business had \$400 of current ordinary income, \$100 of interest, and \$10,000 of gain from sale of assets. The taxpayer reports income as follows:

<u>Income</u>		
Sales	\$20,000	
Interest	\$100	
Total receipts from business		<u>\$20,100</u>
<u>Ordinary Expenses</u>		
Salary	\$9,000	
Cost of sales	\$8,000	
Depreciation	\$2,600	<u>(\$19,600)</u>
Net profit from business		<u>\$500</u>
Net gain from disposition of property		\$10,000

The taxpayer will report \$500 net profit from business and \$10,000 net gain from disposition of property.

Example 5:

A nonresident operates a sole proprietorship business in New Jersey and Pennsylvania with 60 percent of the profits allocated to New Jersey and 40 percent allocated to Pennsylvania. The profit for the operation of the business was \$20,000 for the year. On December 31, 2005 he sells the business including all the assets in a complete liquidation. The assets include two parcels of real property. The parcel in New Jersey sold at a gain of \$10,000 and the parcel in Pennsylvania sold at a gain of \$7,000. Additionally, he sold equipment, inventory and other tangible assets at a gain of \$5,000 of which \$2,750 was sourced to New Jersey.

<u>Gain from complete liquidation</u>	<u>Everywhere</u>	<u>New Jersey</u>
Gain from real property	\$17,000	\$10,000
Gain from tangible assets	\$5,000	\$2,750
Gain from complete liquidation	<u>\$22,000</u>	<u>\$12,750</u>

The taxpayer reports income as follows on his nonresident New Jersey Gross Income Tax Return.

Net profit from business	<u>\$20,000</u>	<u>\$12,000</u>
Gain or loss from disposition of property	<u>\$22,000</u>	<u>\$12,750</u>
Total	\$42,000	\$24,750

New Rule, R.1994 d.110, effective March 7, 1994.

See: 25 N.J.R. 677(a), 26 N.J.R. 1241(b).

Recodified from N.J.A.C. 18:35-1.25 and amended by R.1998 d.195, effective April 20, 1998.

See: 30 N.J.R. 612(a), 30 N.J.R. 1428(a).

In (b)8, changed N.J.A.C. reference. Former N.J.A.C. 18:35-1.1, Summer payment plan, recodified as N.J.A.C. 18:35-7.4.

Repeal and New Rule, R.1999 d.95, effective March 15, 1999.

See: 30 N.J.R. 3377(b), 31 N.J.R. 779(a).

Section was "Net profits from business".

Amended by R.2007 d.14, effective January 16, 2007.

See: 38 N.J.R. 3502(a), 39 N.J.R. 238(b).

In (c)5, rewrote the last sentence; added (c)5i; added (d)2i; in (e)4, updated the address; added (e)5; in (h), added dollar signs throughout tables and added Examples 4 and 5; and in Example 1 of (h), substituted "106,300" for "106,400", "143,750" for "143,650" twice, and "144,150" for "144,050".

Case Notes

Proposed amendment to tax regulations governing operating loss carryovers was not long-standing practical administrative construction of Gross Income Tax Act in which Legislature had acquiesced, so as to warrant judicial deference. *Marrinan v. State*, 17 N.J.Tax 47 (N.J.Tax 1997).

Costs, expenses, or losses that are paid or incurred in ordinary course of business are deductible against business income, even if items deducted arise only infrequently. *Sabino v. Director, Division of Taxation*, 17 N.J.Tax 29 (N.J.Tax 1997).

18:35-1.2 Employee business expenses not deductible

(a) If an individual is an employee as defined in N.J.A.C. 18:35-7.1, such person shall not deduct from gross income any costs and expenses incurred in connection with such employment.

(b) If an individual is an employee as defined in N.J.A.C. 18:35-7.1, all earnings in connection with employment are deemed to be and shall be reported by the taxpayer as wages, salaries, commissions, bonuses and other remuneration received for services rendered, pursuant to N.J.S.A. 54A:5-1(a). In no case shall an employee report his or her earnings as net profits from business as defined by N.J.S.A. 54A:5-1(b).

New Rule, R.1988 d.419, effective September 6, 1988.

See: 20 N.J.R. 515(a), 20 N.J.R. 2319(c).

Recodified from N.J.A.C. 18:35-1.23 and amended by R.1998 d.195, effective April 20, 1998.

See: 30 N.J.R. 612(a), 30 N.J.R. 1428(a).

Changed N.J.A.C. references throughout. Former N.J.A.C. 18:35-1.2, Clergymen; self-employed; income; expenses, recodified as N.J.A.C. 18:35-1.4.

18:35-1.3 Partnerships and partners

(a) The following words and terms, when used in this section, shall have the following meanings:

1. "Partnership" means and shall include a syndicate, group, pool, joint venture and any other unincorporated organization through or by means of which any business, financial operation or venture is carried on and which is not a corporation, trust or estate within the meaning of the New Jersey Gross Income Tax Act. Only entities that qualify for and elect to be treated as partnerships for Federal tax purposes (for example, Limited Liability Companies and Limited Liability Partnerships) and are in business shall be treated as partnerships under the Gross Income Tax Act.

2. "Partner" means any owner of a partnership interest and shall include any taxpayer subject to the Gross Income Tax who is a member of a partnership or other unincorporated entity taxed as a partnership. A partner cannot be an employee of the partnership for purposes of determining distributive share of partnership income.

(b) Partners, not partnerships, are subject to tax. Taxpayer partners shall be subject to Gross Income Tax on their distributive share of partnership income, whether or not distributed. Such income shall be reported as distributive share of partnership income, pursuant to N.J.S.A. 54A:5-1(k), regardless of the character or category of the income derived by the partnership.

1. Partners who are resident taxpayers of New Jersey are subject to Gross Income Tax on their entire distributive shares of partnership income, regardless of the source of the income.

2. Partners who are nonresident taxpayers of New Jersey are subject to Gross Income Tax on their distributive shares of partnership income, but only to the extent such income was derived by the partnership from sources within New Jersey. Refer to (d)4 below for rules governing sourcing or allocating income.

(c) Partnership income or loss, to be reported on the NJ-1065, shall be comprised of all income or loss, received, derived or incurred by the partnership and all expenses allowable under N.J.A.C. 18:35-1.1(d) that are not prohibited or limited under the Gross Income Tax Act, in accordance with the partnership's Federal method of accounting and reported in the same tax period as reported Federally.

(d) A partner's distributive share of partnership income or loss shall be comprised of the following:

1. Any and all income or loss earned by the partnership and passed through to the partner by the partnership for a taxable period shall be reported in the category of income "distributive share of partnership income" pursuant to N.J.S.A. 54A:5-1(k).

i. Each partner's respective percentage of distributive share of partnership income or loss shall be determined by the partnership agreement and allocated accordingly or in the manner determined to be allocable or allocated for Federal income tax purposes (or by Federal income tax authorities).

ii. The income or loss comprising a partner's distributive share of partnership income as set forth in (d)1 above shall be taxed and reported as the partner's distributive share of partnership income without regard to character or category of income earned, derived, or incurred by the partnership.

iii. The income or loss referred to in (d)1 above, shall be reported by the partner pursuant to N.J.S.A. 54A:5-1(k) after taking into account:

(1) Expenses incurred directly by the partner in the conduct of partnership business for the tax period, in the manner and subject to the provisions and limitations provided in N.J.A.C. 18:35-1.1(d), and not prohibited under the New Jersey Gross Income Tax Act.

(2) Interest expense on capital contributions incurred by a partner, as required by the partnership for participation in the partnership, is deductible.

(3) Contributions to a Federal I.R.C. 401(k) plan are limited to the amount of the Federal exclusion as provided in N.J.S.A. 54A:6-21. Matching contributions made by the partnership for the partners are not deductible. Contributions or payments made to Keogh plans or other retirement/deferred compensation plans are not deductible expenses.

2. A complete liquidation of a partnership is deemed to occur in the tax year when it and all its partners discontinue all partnership activities; all its assets have been distributed to the partners; and the partners are required to recognize gain or loss on the disposition of their partnership interests for Federal income tax purposes.

i. The partnership's gain or loss from the sale or disposition of its assets as a result of a complete liquidation are to be separately reported as "net gains or income from disposition of property" in accordance with N.J.S.A. 54A:5-1(c) on the NJ-1065 and the partner's NJK1s.

ii. A resident partner reports the distributive share of the partnership's gain or loss from the sale or disposition of its assets as a result of a complete liquidation as "net gain or income from the disposition of property" in accordance with N.J.S.A. 54A:5-1(c). The partner will make a separate calculation to determine his or her gain or loss on the sale of the partnership interest which is reported in accordance with N.J.S.A. 54A:5-1(c).

iii. A nonresident partner will report his or her distributive share of the partnership's gain or loss from the sale or disposition of its assets as a result of a complete liquidation as "net gain or income from the disposition of property" in accordance with N.J.S.A. 54A:5-1(c) and is included in both Columns A (Amount of Gross Income Everywhere) and B (Amount from New Jersey Sources) on Form NJ-1040NR. The partner makes a separate calculation to determine gain or loss on the sale of the partnership interest which is reported in accordance with N.J.S.A. 54A:5-1(c) and included in Column A (Amount of Gross Income Everywhere) only on Form NJ-1040NR.

3. Guaranteed payments shall be reported as distributive share of partnership income, except guaranteed payments received by a retired partner who is receiving such payments as a result of a period of service to the partnership pursuant to a retirement agreement or pension plan.

Such guaranteed payments will be treated as pension income to retired partners and should be reported by the partner as pension income, described in N.J.S.A. 54A:5-1j.

4. The allocation of partnership income derived from sources either within or outside of New Jersey, except for tiered partnerships and complete liquidations, shall be as follows:

i. Where a partnership's activity is carried on solely within New Jersey, all items of the income, gain, expense or loss of the partnership are deemed to have been derived from sources within New Jersey. No allocation schedule is required.

ii. Where a partnership's activity is carried on solely outside of New Jersey, the partnership shall complete either New Jersey Business Allocation Schedule (Form NJ-1040-NR-A) or a schedule reflecting an approved allocation method under (d)4v below. Failure to provide such schedule results in allocation of all income to New Jersey.

iii. Where a partnership's activity is carried on both within and outside of New Jersey, the portion of the partnership's income, gains, expenses or losses attributable to sources within New Jersey shall, except as provided in (d)4iv and v below, be determined by use of the New Jersey Business Allocation Schedule (Form NJ-1040-NR-A), as prepared by the partnership. Failure to provide such schedule may result in allocation of all income to New Jersey.

iv. Partnership income or loss from rental real estate activities and/or net gains or income from the sale or disposition of real property located in New Jersey is sourced to New Jersey.

v. Where a partnership's activity is carried on solely outside of New Jersey or both within and outside of New Jersey, and the partnership believes that the determination of partnership income, gains, expenses or losses attributable to sources within and outside of New Jersey by use of the New Jersey Business Allocation Schedule does not provide an equitable allocation of such items, and the books and records of the partnership will disclose to the Director's satisfaction a more appropriate method of allocation of such items, the partnership may request from the Director an exception from the use of the New Jersey Business Allocation Schedule. Such request shall be made in writing and set forth the basis of the request and the substitute method of allocation requested to be used. Such request shall be mailed to the Chief of the Individual Tax Audit Branch, New Jersey Division of Taxation, PO Box 288, Trenton, NJ 08695-0288. The substitute method of allocation shall not be utilized prior to the written approval of such request by the Director. The partnership's exception request, once approved, shall not be changed without prior written approval of the Director. All exception requests must be renewed every three years.

5. The allocation of gain or loss from a complete liquidation is determined as follows:

- i. The gain or loss from the sale of real and tangible assets located in New Jersey is sourced to New Jersey.
- ii. The gain or loss from the sale of motor vehicle equipment is sourced to the state where the vehicle is registered, unless used predominantly in one state.
- iii. The gain or loss from the sale of intangibles is allocated using the average of the last three years business allocation used, as defined in (c)4 above.

6. A tiered partnership shall take into account its distributive share of partnership income from any partnership of which it is a member. Once income has been allocated by a partnership, it shall not be reallocated by the partners.

7. Partnership contributions to a qualified pension plan under the Internal Revenue Code made on behalf of employees of the partnership and deductible as business expenses for Federal income tax purposes also are deductible under N.J.A.C. 18:35-1.1(d), consistent with (d)1 above, in determining the net income of the partnership.

(e) Partners who are taxpayers for Gross Income Tax purposes shall report their partnership income according to the following:

1. Partners who own more than one partnership interest shall determine their distributive share for each partnership interest separately. Once distributive share from each partnership interest has been determined, taxpayers shall net all distributive shares and report the total in the category, "distributive share of partnership income" under N.J.S.A. 54A:5-1k.

2. A partner may deduct unreimbursed expenses incurred in the conduct of the partnership's business if the expenses meet the deductibility standard of an ordinary business expense as described in N.J.A.C. 18:35-1.1(d).

3. In reporting partnership income, a partner may deduct payments made to a qualified Internal Revenue Code section 401(k) plan to the extent allowable for Federal income tax purposes, as provided in N.J.S.A. 54A:6-21.

4. A partner's contributions to the partnership's qualified Keogh plan under the Internal Revenue Code are not deductible business expenses under the standard provided in N.J.A.C. 18:35-1.1(d), consistent with (d)1 above. Such contributions are included in the participating partner's distributive share of partnership income reported for New Jersey gross income tax purposes. Previously taxed contributions to a Keogh Plan are not subject to tax when subsequently withdrawn by the partners.

5. Distributive share of partnership income or loss shall not be combined with other categories of income or loss. See N.J.A.C. 18:35-1.1(c)6.

6. If the partner and the partnership have different taxable years, the partner shall report his or her distributive share of partnership income for the partnership's taxable year that ended within the partner's taxable year.

7. A partner who is a resident taxpayer for part of any taxable year and a nonresident taxpayer for part of the same taxable year is required to report his or her distributive share of partnership income as follows:

- i. The part-year resident return shall include the portion of the partner's distributive share of the partnership income determined by multiplying the partner's entire distributive share of partnership income as determined under (d) above by the percentage which the number of days of the partnership's fiscal year that the partner was a New Jersey resident bears to 365 (366 for a leap year).

- ii. The part-year nonresident return shall include the portion of the partner's distributive share of partnership income as follows:

- (1) If the distributive share of partnership income was derived entirely from New Jersey sources, the portion of that distributive share of partnership income determined by multiplying the partner's entire distributive share of partnership income by the percentage which the number of days of the partnership's fiscal year that the partner was not a New Jersey resident bears to 365 (366 for a leap year); or

- (2) If the distributive share of partnership income was derived partly within New Jersey and partly outside New Jersey, the portion of such distributive share determined by multiplying the partner's entire distributive share of partnership income derived by the partnership from sources within New Jersey (determined as provided in (d)4ii or (d)4iii above), by the percentage which the number of days of the partnership's fiscal year that the percentage was not a New Jersey resident bears to 365 (366 for a leap year).

- iii. A partner who is a resident taxpayer for part of the tax year and a nonresident taxpayer for the remainder of the tax year shall attach a schedule to the partner's part year NJ-1040 and the part year NJ-1040-NR showing the calculations used to determine the amounts reported on each return with respect to income or loss of a partnership.

(f) Partnership filing requirements are as follows:

1. Partnerships having a New Jersey resident partner or having any income or loss derived from New Jersey sources shall file the following with the Division:

- i. Form NJ-1065, including the partner directory;

Additionally, Partner X had a gain of \$5,000 on the disposition of his partnership interest and Partner Y had a loss of \$2,000 on the disposition of her partnership interest.

The partners will report the following on their individual returns:

Partner X	
NJ-1040	
Net gains or income from disposition of property:	
Gain/loss from complete liquidation	\$7,500
Gain/loss sale of partnership interest	\$5,000 \$12,500
Distributive share of partnership income	\$2,000

Partner Y		New Jersey	
NJ-1040NR	Everywhere		
Net gains or income from disposition of property:			
Gain/loss from complete liquidation	\$7,500	\$4,800	
Gain/loss sale of partnership interest	(\$2,000)	\$0	\$5,500 \$4,800
Distributive share of partnership income		\$2,000	\$1,500

Since the partnership had a complete liquidation, Partner X will report \$2,000 in the distributive share of partnership income category and \$12,500 in the net gains from disposition of property category.

Partner Y will report \$2,000 in the distributive share of partnership income category and \$5,500 in the net gains from disposition of property category in the everywhere column and \$1,500 in the distributive share of partnership income category and \$4,800 in the net gains from disposition of property category in the New Jersey source column. The gain or loss from the sale of a partnership interest is from an intangible not employed in a trade or business therefore, not subject to tax for a nonresident.

Example 12:

Partners A and B who are both residents of New Jersey share profit and loss equally. On August 31, 2005, Partners A and B sold their rental building located in New Jersey at a gain of \$16,000. The partnership continued operating their other business activity, which generated ordinary income of \$20,000.

The partnership in completing its NJ-1065 will determine partnership income as follows:

Ordinary income	\$20,000
Gain from disposition	<u>\$16,000</u>
Partnership income	\$36,000

Since the partnership did not have a complete liquidation, the partnership will include the gain from the sale of its rental property in with partnership income.

The partners will report the following on their individual tax returns:

	Partner A (1/2)	Partner B (1/2)
NJ-1040		
Partnership income	\$18,000	\$18,000

Amended by R.1981 d.6, effective January 8, 1981.
 See: 12 N.J.R. 676(a), 13 N.J.R. 111(d).
 Repeal and New Rule, R.1994 d.110, effective March 7, 1994.
 See: 25 N.J.R. 677(a), 26 N.J.R. 1241(b).
 Section was "Partnerships".
 Recodified from N.J.A.C. 18:35-1.14 and amended by R.1998 d.195, effective April 20, 1998.
 See: 30 N.J.R. 612(a), 30 N.J.R. 1428(a).
 Changed N.J.A.C. references throughout. Former N.J.A.C. 18:35-1.3, Declaration of estimated tax; 1976, repealed.
 Repeal and New Rule, R.1999 d.95, effective March 15, 1999.
 See: 30 N.J.R. 3377(b), 31 N.J.R. 779(a).
 Section was "Distributive share of partnership income".
 Amended by R.2007 d.14, effective January 16, 2007.
 See: 38 N.J.R. 3502(a), 39 N.J.R. 238(b).
 Rewrote the section.

Case Notes

Statute permitting taxpayer to deduct from partnership business income all costs and expenses incurred in conduct of business authorizes deduction of only ordinary business expenses, not all expenses. Sabino v. Director, Div. of Taxation, 296 N.J.Super. 269, 686 A.2d 1197 (A.D.1996).

Regulation could not exclude from partnership net income dividends and capital gains. Smith v. Director, Div. of Taxation, 108 N.J. 19, 527 A.2d 843 (1987).

Partnership business expenses could be deducted from partnership income when determining taxpayers' distributive share. Smith v. Director, Div. of Taxation, 108 N.J. 19, 527 A.2d 843 (1987).

An individual partner in a law firm that required capital for the running of the operation was permitted to deduct from gross income subject to tax interest on money borrowed to meet his required investment in the partnership. Dantzler v. Director, Division of Taxation, 18 N.J.Tax 507 (1999).

Regulation relating to deductibility of reimbursed expenses of individual partner for purposes of computing partner's distributive share of partnership income; void. Sabino v. Director, Div. of Taxation, 14 N.J.Tax 501 (1995).

Paragraph (c)4 held inconsistent with statute: in determining liability for partner's distributive share of partnership income, partnership expenses incurred in connection with tax exempt income were deductible; expense incurred by securities partnership in the conduct of its business may be deductible against all other forms of partnership income, including dividends and capital gains, in determining partner's distributive shares of partnership income. Smith v. Director, Div. of Taxation, 7 N.J.Tax 187 (Tax Ct.1984), affirmed per curiam 8 N.J.Tax 319, affirmed 108 N.J. 19, 527 A.2d 843 (App.Div.1986).

Depletion expenses of partnership engaged in oil and gas production are properly deductible by a partner subject to New Jersey gross income tax; since percentage depletion, to the extent it exceeds cost depletion, is not attributable to production of income for the purpose of New Jersey gross income tax, it is not deductible in computing New Jersey taxable income. Lee v. Director, Div. of Taxation, 6 N.J.Tax 385 (Tax Ct.1984).

18:35-1.4 Clergymen; self-employed

Duly ordained clergymen are considered to be self-employed individuals for the purposes of the New Jersey Gross Income Tax Act. Accordingly, salaries, fees, honorariums, allowances and other remuneration paid to clergymen for services rendered are not subject to withholding. Therefore, income does not include the rental value of a residence provided for a clergyman by his church or congregation.

R.1976 d.424, effective December 17, 1976.

See: 9 N.J.R. 52(b).

Recodified from N.J.A.C. 18:35-1.2 by R.1998 d.195, effective April 20, 1998.

See: 30 N.J.R. 612(a), 30 N.J.R. 1428(a).

Former N.J.A.C. 18:35-1.4, Information furnished at source, repealed.

18:35-1.5 S corporations and S corporation shareholders

(a) The following words and terms, when used in this section, shall have the following meanings:

“Hybrid” means a Federal S corporation that has not made the New Jersey S corporation election, and the corporation conducts business both within and outside of New Jersey.

“Pro rata share” means the portion of any items attributable to an S corporation shareholder determined in accordance with I.R.C. sections 1377 and 1362.

“S corporation” means a corporation that meets the Federal definition under I.R.C. Section 1361, regardless of whether a New Jersey S corporation election was made.

“S corporation income” means the net of an S corporation’s items of income, loss or deduction, and determined without exclusion of items of income properly taxable or deduction of expenses or losses prohibited for Gross Income Tax purposes.

(b) Determining S corporation’s income. S corporation income is properly determined by netting together all items of income, gain, loss or expense reported on the S corporation’s Federal form 1120S, Schedule K, and making modifications required under the Gross Income Tax Act for expenses and losses which were deducted for Federal purposes, but are not permitted to be deducted for State purposes, Federally exempt income which is taxable to New Jersey, Federally taxable income which was included for Federal purposes, but is exempt for New Jersey purposes, and expenses not deducted Federally, which are allowable for New Jersey.

1. Additions are required for:

i. Taxes based on or measured by profits, income, business presence or business activity, which were paid or accrued to the United States, any state, including New Jersey, a political subdivision of any state, or the District of Columbia. Such taxes include, but are not limited to, corporate franchise or income taxes, unincorporated business taxes, net worth taxes, gross receipts taxes, local and city income taxes, business occupancy taxes;

ii. Income taxes paid or accrued by the S corporation on behalf of, or in satisfaction of the liability of, shareholders of the S corporation;

iii. Expenses incurred to earn or collect income or gains that are exempt from New Jersey tax;

iv. Losses attributable to the disposition of obligations of the Federal government, any of its territories or instrumentalities, the State of New Jersey or its political subdivisions; and

v. Interest income derived from the obligations of states other than New Jersey, their municipalities and political subdivisions.

2. Subtractions are required for:

i. Gains attributable to the disposition of obligations of the Federal government, any of its territories or instrumentalities, the State of New Jersey or its political subdivisions;

ii. Interest income derived from the obligations of the Federal government, any of its territories or instrumentalities, the State of New Jersey or its political subdivisions;

iii. Expenses incurred to generate Federally excludable income which is taxable to New Jersey; and

iv. Expenses which Federally flow to the shareholder as itemized deductions (for example, I.R.C. section 179 expense, charitable contributions) or which are limited for Federal tax purposes (for example, meals and entertainment) unless specifically restricted or prohibited under the Gross Income Tax Act.

(c) A shareholder’s pro rata share is determined by the following:

1. A New Jersey electing S corporation must determine S corporation income and provide each shareholder with a NJ K-1 reporting the shareholder’s pro rata share based on ownership percentage, the New Jersey allocation factor, or deemed allocation factor, and all other information required for the proper filing of a New Jersey Gross Income Tax return.

2. The shareholder of a Federal S corporation that has not made the New Jersey S corporation election must compute the pro rata share on a New Jersey Worksheet, Reconciliation Schedule K-1, Federal Form 1120S using the information from the Federal Schedule K-1, Form 1120S, and in accordance with (b) above.

3. A Federal S corporation’s income or loss is allocated inside or outside of New Jersey based on the percentages determined by the S corporation in accordance with N.J.S.A. 54A:5-10.

4. A Federal S corporation that does not have a New Jersey filing requirement and does not file a New Jersey

Net pro rata share of S corporation income:		\$2,063
Net gains or income from disposition of property:		
Gain on sale of S corporation assets allocated outside New Jersey	\$10,450	
Gain on sale of New Jersey C corporation stock	\$5,400	
Loss on sale of Federal S corporation stock	(\$7,813)	\$8,037

Nonresident shareholder:

For a nonresident shareholder there is no New Jersey source income from these transactions. If the nonresident has a New Jersey filing requirement due to other New Jersey activity this transaction would be included on the nonresident return in the following manner:

	Everywhere Income	New Jersey Income
Net pro rata share of S corporation income	\$2,063	\$0
Gain from disposition of property	\$8,037	\$0

New Rule, R.2007 d.14, effective January 16, 2007.
See: 38 N.J.R. 3502(a), 39 N.J.R. 238(b).

SUBCHAPTER 2. EXCLUSIONS AND DEDUCTIONS

**18:35-2.1 Interest and gains from certain obligations;
taxable status of State and Federal securities**

(a) Gross income shall not include interest on obligations:

(b) Amounts received by an employee on account of personal injury or sickness qualify for exclusion from taxable gross income when received under the provisions of an employee accident or health insurance plan which satisfies the following requirements:

1. The payments must be compensation for wage loss which results from absence due to injury or sickness of the employee; and
2. The payments must have a requisite certainty under an enforceable contractual obligation under the plan (see (e) below); and
3. The payments must not relate to sick leave wage continuation, the taking of which is largely discretionary and the payments are made regardless of the reason for absence from work.

(c) The exclusion from taxable gross income applies to payments to employees under a health or accident insurance plan regardless of whether insurance coverage is with a commercial insurance company to which premiums are paid by both employees and employer or solely by the employer; or whether insurance coverage is provided by an employer's self-insured plan for which no insurance premiums are paid by the employees.

(d) The exclusion from taxable gross income applies to payments required to be made to employees under the State mandated temporary disability benefit plan pursuant to the New Jersey Temporary Disability Law (N.J.S.A. 43:21-25, et seq.). Payments which are excludable from taxable gross income include temporary disability benefit payments required to be made under the State Plan which is administered by the Bureau of State Plan Disability Benefits under the New Jersey Disability Law. Exclusion from taxable gross income also includes payments required to be made to employees under a company's private plan established pursuant to New Jersey law in lieu of the State Plan described in the preceding sentence and which has been approved by the Bureau of Private Plan Disability Benefits, Division of Unemployment Insurance and Disability Insurance.

(e) Where payment to employees under the health or accident insurance plan is largely discretionary with the employer, such as during the initial period (for example, first seven days), the exclusion from taxable gross income does not apply. Such payments to the employee are subject to tax as wages and salaries. In order for a wage loss payment made under an accident or health insurance plan to be excludable from taxable gross income, the payment to the employee must have a requisite certainty under an enforceable contractual obligation.

(f) Effective June 1, 1982, withholding of the gross income tax shall be required on all payments of wages and salaries made to an employee by an employer. The withholding of the tax is required even though such payments meet all the conditions for exclusion from taxable gross

income as made through an accident or health insurance plan for personal injuries or sickness under this section. The only exceptions for the withholding of tax shall be for the following:

1. Temporary disability benefit payments required to be made under the State Plan which is administered by the Bureau of State Plan Disability Benefits under the New Jersey Disability Law;
2. Temporary disability benefit payments required to be made to employees under a company's private plan established pursuant to New Jersey law in lieu of the State Plan described in (f)1 above and which has been approved by the Bureau of Private Plan Disability Benefits, Division of Unemployment Insurance and Disability Insurance; and
3. Payments made to employees for personal injuries or sickness under a health or accident insurance policy by a commercial insurance company.

(g) All taxpayers will be required to file with their annual New Jersey Gross Income Tax Return a claim form furnished by the director for the exclusion of any amounts received by them as an employee through an accident or health insurance plan for personal injuries or sickness which meet all the conditions for exclusion from taxable gross income under (f)1, 2 and 3 above.

1. Examples:

i. An employee of Company X is allowed 12 vacation days and 15 sick days for the year 1982. The employee uses 12 vacation days and 10 sick days in 1982 for which he receives his regular wage payment, regardless of the cause for his absence. The amounts received by the employee in 1982 for the 12 vacation days and 10 sick days are subject to tax as wage and salary income to the employee and the employer must also withhold gross income tax on such payments.

ii. Company Y has a self-insured disability plan for its employees who are absent from work because of accident or sickness. The plan is fully funded by the employer company and the employees make no contribution to the plan. Payment for the full amount of wages is made to disabled employees absent from work, on the eighth calendar day. Payment for the initial seven days to the covered employee is discretionary with the company employer under the plan. The amount received by the absent employee because of his disability is excludable from taxable gross income as health or accident insurance after the initial seven days of absence but is subject to withholding tax. Any amount received by the employee as payment for the seven initial days is subject to tax as wage and salary income to the employee and is also subject to withholding tax.

iii. Employee C receives a payment in 1982 from the New Jersey Disability Benefit Fund during an ab-

sence from work because of temporary disability resulting from illness. Both the employee and employer have contributed to the disability benefit fund. The total amount received by the employee from the New Jersey Disability Benefit Fund is excludable from taxable gross income as a payment for health or accident insurance and is not subject to withholding tax.

iv. Employee D is absent from work in 1982 because of illness and receives from the X Insurance Company the full amount of his wages during the period of his absence from work. The payment was made from a health or accident insurance policy to which only the employer has contributed. The amounts received by the employee are excludable from taxable gross income as health or accident insurance and are not subject to withholding tax.

R.1982 d.164, effective June 7, 1982.

See: 14 N.J.R. 271(a), 14 N.J.R. 581(a).

Recodified from N.J.A.C. 18:35-1.15 and amended by R.1998 d.195, effective April 20, 1998.

See: 30 N.J.R. 612(a), 30 N.J.R. 1428(a).

Former N.J.A.C. 18:35-2.3, Procedure for setoff, recodified as N.J.A.C. 18:35-10.3.

18:35-2.4 Election to exclude up to \$500,000 of gain on sale of principal residence

(a) The rule concerning the election to exclude up to \$250,000 (\$500,000 on a joint return) of gain on the sale of a principal residence are as follows:

1. General rule: Capital gains exclusion; taxpayers selling their principal residence may exclude all or part of any gain on the sale of a principal residence from gross income, regardless of age. Capital gain and the exclusion of all or part of the gain is computed in the same manner as for Federal income tax purposes.

2. Requirement: Regardless of their age, the exclusion can be claimed if, during the five-year period ending on the date of the sale, taxpayers meet the following two tests:

i. The taxpayer has owned the home for at least two years (ownership test); and

ii. The taxpayer has lived in the home as a principal residence for at least two years (the use test).

3. Joint return: In the case of jointly owned property where a joint return is filed, the taxpayers qualify for the exclusion if all of (a)3i through iii below apply. If only one spouse meets the requirements in (a)3i and ii below, the qualified spouse can exclude up to \$250,000 of the gain when filing a joint or separate return.

i. Either spouse owned the property for a total of two years within the five-year period ending on the date of the sale; and

ii. Both spouses must have used the property as their principal residence for two years within the five-year period ending on the date of sale; and

iii. Neither spouse sold and excluded the gain from the sale of another home during the two years prior to the date of sale and after May 6, 1997.

4. Deceased spouse: In the case of an unmarried individual whose spouse is deceased on the date of the sale or exchange of property, the period the unmarried individual owned and used the property includes the period the deceased spouse owned and used the property before the deceased spouse's death.

5. Amount of exclusion: Any amount that is taxable on the gain from the sale of a principal residence for Federal income tax purposes is taxable for New Jersey income tax purposes. Any amount that is excludable for Federal income tax purposes is excludable for New Jersey income tax purposes.

6. The taxpayer must elect to exclude the gain realized from the sale or exchange of a principal residence for Federal income tax purposes in order to take the same exclusion for New Jersey income tax purposes.

7. Taxpayers who meet the Federal qualifications for a reduced exclusion due to a change in health, place of employment or unforeseen circumstances may also claim the same reduced exclusion amount for New Jersey income tax purposes.

R.1979 d.475, effective December 5, 1979.

See: 11 N.J.R. 594(a), 12 N.J.R. 56(c).

Amended by R.1987 d.476, effective November 16, 1987.

See: 19 N.J.R. 1182(a), 19 N.J.R. 2201(c).

18-month changed to two-year.

Recodified from N.J.A.C. 18:35-1.13 by R.1998 d.195, effective April 20, 1998.

See: 30 N.J.R. 612(a), 30 N.J.R. 1428(a).

Former N.J.A.C. 18:35-2.4, Matching, recodified as N.J.A.C. 18:35-10.4.

Amended by R.2003 d.285, effective July 21, 2003.

See: 35 N.J.R. 1384(a), 35 N.J.R. 3386(a).

Rewrote the section.

18:35-2.5 Pensions and annuities

(a) An employee may defer the payment of tax on employee and employer contributions to I.R.C. 401(k) deferred compensation plans. Contributions to any other type of retirement plan including, but not limited to, plans under I.R.C. 403(b), I.R.C. 457, I.R.C. 414(h), SEP, Federal Thrift Savings Funds or Individual Retirement Accounts must be included in gross income.

(b) Disability pensions: Pension amounts received as a result of a permanent and total disability are excludable from gross income.

1. "Permanent and total" disability means the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment.

During December 1985 A files an amended Gross Income Tax Return containing New Jersey 2450 for 1983 claiming a credit for excess contributions withheld and claiming the alimony deduction that he had originally omitted from the 1983 return. The claim is timely filed with respect to both the contributions withheld and the alimony deduction.

Example 2: Same facts as above except A files an amended return on January 5, 1986. The claim for contributions withheld is too late since it was filed after the expiration of the two year period for refund. The claim for refund based upon alimony deductions, however, is timely because the claim was filed within three years from the time the return was filed or two years from the time the tax was paid, whichever was later.

(d) Claims for gross income credit for excess contributions made by an employee are subject to the provisions of N.J.S.A. 54A:9-8.1 and N.J.A.C. 18:35-10.

New Rule, R.1983 d.586, effective December 19, 1983.

See: 15 N.J.R. 1570(a), 15 N.J.R. 2175(c).

Amended by R.1993 d.136, effective April 5, 1993.

See: 25 N.J.R. 62(a), 25 N.J.R. 1518(b).

Added new (a)liii; redesignated old (a)liii and iv to (a)liv and v; revised (b) and (c).

Amended by R.1994 d.146, effective March 21, 1994.

See: 26 N.J.R. 336(a), 26 N.J.R. 1372(a).

Recodified from N.J.A.C. 18:35-1.17 and amended by R.1998 d.195, effective April 20, 1998.

See: 30 N.J.R. 612(a), 30 N.J.R. 1428(a).

In (d), changed N.J.A.C. reference.

18:35-4.3 Earned Income Tax Credit

(a) The following terms, as used in this section, shall have the following meanings:

“Gross income” means gross income required to be reported under the New Jersey Gross Income Tax Act, N.J.S.A. 54A:1-1 et seq., other than income excludable from the gross income tax return, but before reduction by any applicable exemptions, deductions and credits received during the taxable year by the individual or married individuals filing a joint return; and, in the case of a part-year resident, gross income means gross income a part-year resident would have reported if the part-year resident had been a resident of New Jersey for the entire taxable year.

“Federal earned income tax credit” means the credit against Federal income tax provided under section 32 of the Federal Internal Revenue Code, 26 U.S.C. § 32.

“New Jersey Earned Income Tax Credit” means the credit against gross income tax provided under N.J.S.A. 54A:4-6 to 4-10.

“Qualifying child” means qualifying child as meant under section 32 of the Federal Internal Revenue Code, 26 U.S.C. § 32.

“Resident” means resident as defined under the New Jersey Gross Income Tax Act, N.J.S.A. 54A:1-1 et seq.

(b) A resident individual who has gross income of \$20,000 or less for the taxable year and who files as a head of household or surviving spouse for Federal and gross income tax purposes is eligible for a New Jersey Earned Income Tax Credit. The New Jersey credit shall be calculated by multiplying the applicable percentage found in (d) below times the Federal earned income tax credit claimed by and allowed to the resident under section 32 of the Federal Internal Revenue Code, 26 U.S.C. § 32. The resident claimant must also satisfy the requirements found in (e) below.

(c) Married resident individuals who have combined gross income of \$20,000 or less and who file a joint return for Federal and gross income tax purposes are eligible for a New Jersey Earned Income Tax Credit. The New Jersey credit shall be calculated by multiplying the applicable percentage found in (d) below times the Federal earned income tax credit claimed by and allowed to the couple under section 32 of the Federal Internal Revenue Code, 26 U.S.C. § 32. The resident claimants must also satisfy the requirements found in (e) below.

(d) The New Jersey Earned Income Tax Credit is the following percentage of the Federal earned income tax credit:

1. For the taxable year beginning on or after January 1, 2000 (but before January 1, 2001), 10 percent of the Federal earned income tax credit allowed and claimed for the same taxable year;
2. For the taxable year beginning on or after January 1, 2001 (but before January 1, 2002), 15 percent of the Federal earned income tax credit allowed and claimed for the same taxable year;
3. For the taxable year beginning on or after January 1, 2002 (but before January 1, 2003), 17.5 percent of the Federal earned income tax credit allowed and claimed for the same taxable year; and
4. For taxable years beginning on or after January 1, 2003, 20 percent of the Federal earned income tax credit allowed and claimed for the same taxable year.

(e) In addition to the requirements in (b) and (c) above, to qualify for the New Jersey Earned Income Tax Credit:

1. The individual or individuals claiming the New Jersey Earned Income Tax Credit must claim and be allowed a Federal earned income tax credit, for the same taxable year, that is based on the individual or individuals having at least one “qualifying child”;
2. The individual or individuals shall file a New Jersey Gross Income Tax return, complete the schedule for the earned income tax credit and provide such information, documentation and copies of Federal income tax forms as required by the Director of the Division of Taxation; and
3. If the individual claiming the New Jersey Earned Income Tax Credit is married, except for an individual whose

tax filing status is “head of household” or “surviving spouse” for Federal and gross income tax purposes, the individual and the individual’s spouse shall file a joint return to claim the New Jersey Earned Income Tax Credit.

(f) The New Jersey Earned Income Tax Credit shall be deemed to be a credit towards or payment of gross income tax on the 15th day of the fourth month following the close of the taxable year for which a credit is claimed. Any claim for the credit must be filed by the date established under N.J.S.A. 54A:9-8 (generally, three years from the filing of the return or two years from the date of payment of the tax, whichever is later).

(g) If a part-year resident of New Jersey claims, and is qualified for, a New Jersey Earned Income Tax Credit, the part-year resident’s credit amount shall be pro-rated based on that proportion which the total number of months of the claimant’s residency within the taxable year bears to 12 in that year.

(h) If a claimant for the New Jersey Earned Income Tax Credit asks the Federal Internal Revenue Service to calculate the Federal earned income tax credit, the claim for the New Jersey Earned Income Tax Credit shall be incomplete until the Division of Taxation receives information from the Federal Internal Revenue Service concerning the amount, if any, of the Federal earned income tax credit.

(i) The New Jersey Earned Income Tax Credit of an individual, or of married individuals filing jointly, shall be reduced by the amount of any New Jersey State tax deficiency owed by the individual or individuals and by the amount of any indebtedness authorized for setoff under N.J.S.A. 54A:9-8.1 or under any other pertinent State or Federal law. (For set-off policies and procedures, see N.J.A.C. 18:2-5.4 and N.J.A.C. 18:35-10.) After all such reductions, any remaining New Jersey Earned Income Tax Credit amount shall be refunded to the individual or individuals as an overpayment of gross income tax, either separately or in combination with any other overpayment of gross income tax.

(j) If an individual or married couple claimed a New Jersey Earned Income Tax Credit for a taxable year for which the individual or couple’s Federal earned income tax credit was changed or disallowed by the U.S. Internal Revenue Service or other competent authority, the individual or couple shall notify the Division of Taxation, as required by N.J.S.A. 54A:8-7, within 90 days of the final determination.

(k) If an individual or married couple receives a New Jersey Earned Income Tax Credit amount for which the indi-

vidual or couple is not qualified, the Division of Taxation shall recover the amount from the individual or couple in the same manner as the Division recovers erroneous refunds of gross income tax under the provisions of the Gross Income Tax Act, N.J.S.A. 54A:1-1 et seq. Also, the individual or couple will be subject to such other sanctions and penalties as may apply in the circumstances.

(l) The provisions of this section are illustrated by the following examples:

Example 1: Terry has New Jersey gross income of \$19,500 for the taxable year, which is wage income, and which does not include \$1,000 that she elected to defer into a “section 401(k)” pension plan. She has a “qualifying child” and she qualifies for and claims, on her Federal income tax return, a Federal earned income tax credit that is based on having a qualifying child. She is eligible for a New Jersey Earned Income Tax Credit. The \$1,000 deferral does not cause her income to exceed the \$20,000 income limit for qualifying for the New Jersey credit, because qualified section 401(k) deferrals are excludable from New Jersey gross income. (Please note, however, elective deferrals for other types of pension plans are not excludable from New Jersey gross income.)

Example 2: Sam has \$10,000 in New Jersey gross income for the taxable year, consisting of self-employment income, and he does not have a “qualifying child.” He qualifies for and claims a small Federal earned income tax credit. He is not eligible for a New Jersey Earned Income Tax Credit, because his Federal earned income tax credit is not based on having a qualifying child.

New Rule, R.2002 d.2, effective January 7, 2002.
See: 33 N.J.R. 2735(a), 33 N.J.R. 3280(a), 34 N.J.R. 298(a).

18:35-4.4 Film tax credit

(a) See N.J.A.C. 18:7-3B for rules that apply to the film production tax credit and transfer program instituted pursuant to P.L. 2005, c. 345, §1. and 2. (N.J.S.A. 54:10A-5.39 and 54A:4-12.)

(b) The amount of credit allowed pursuant to this section shall be applied against the gross income tax after all other credits and payments. If the credit exceeds the amount of tax otherwise due, that amount of excess shall be an overpayment for the purposes of N.J.S.A. 54A:9-7.

New Rule, R.2007 d.203, effective July 2, 2007.
See: 39 N.J.R. 848(a), 39 N.J.R. 2540(b).

SUBCHAPTER 5. NEW JERSEY SOURCE
INCOME OF NONRESIDENTS**18:35-5.1 Compensation received by nonresident
professional athletes**

(a) The New Jersey source income of a nonresident individual who is a member of a professional athletic team includes that portion of such individual's total compensation for services rendered as a member of a professional athletic team during the taxable year which the number of duty days spent within New Jersey rendering services for the team in any manner during the taxable year bears to the total number of duty days spent both within and without New Jersey during the taxable year.

(b) For purposes of this section:

1. "Professional athletic team" includes, but is not limited to, any professional baseball, basketball, football, soccer or hockey team.

2. "Member of a professional athletic team" includes those employees who are active players, players on the disabled list and any other persons required to travel and who do travel with and perform services on behalf of a professional athletic team on a regular basis. This includes, but is not limited to, coaches, managers and trainers.

3. "Duty days" means, except as provided in (b)3iii and iv below, all days including the taxable year from the beginning of the professional athletic team's official pre-season training period through the last game in which the team competes or is scheduled to compete.

original due date of the return, the taxpayer has paid in, either through withholdings, estimated payments, or a payment made with the Application for Extension of Time to File, at least 80 percent of the tax liability computed on the New Jersey Gross Income Tax Return when filed, and:

1. The taxpayer obtains a valid six-month extension for Federal income tax purposes and attaches a copy of the application for automatic Federal extension to the final New Jersey Gross Income Tax Return when filed; or

2. If no Federal extension is requested, the taxpayer completes and submits Form NJ-630 by the original due date of the return.

(c) A taxpayer shall file Form NJ-630, Application for Extension of Time to File New Jersey Gross Income Tax Return, only if:

1. The taxpayer requires a six-month extension for New Jersey purposes, but did not obtain one for Federal purposes; or

2. The taxpayer is required to remit payment to the Division of Taxation by the original due date of the return in order to meet the 80 percent requirement of (b) above.

(d) Failure to satisfy either the 80 percent payment requirement of (b) above by the original due date of the return, or to file the gross income tax return by the extended due date, will result in the retroactive denial of the extension as of the original due date of the return. In those cases, the taxpayer will be subject to interest, late filing penalties and late payment penalties from the original due date of the return, as described in (e) and (f) below.

(e) A taxpayer who has not satisfied the 80 percent payment requirement of (b) above, or who fails to file the gross income tax return by the extended due date, will be subject to the following late filing penalties (see N.J.S.A. 54:49-4):

1. \$100.00 per month or any fraction of a month that the return is delinquent; and

2. Five percent per month or any fraction of a month that the return is delinquent, up to a maximum of 25 percent of the balance of any tax due with the return.

3. Both penalties set forth in (e)1 and 2 above shall be imposed on the first day following the original due date of the return and on the same calendar day of each succeeding month thereafter.

(f) The extension authorized by N.J.S.A. 54A:8-1b and this section is an extension of time to file a gross income tax return. It is not an extension of time to pay any tax that may be due. Consequently, a taxpayer who makes a payment of tax after the original due date of the return, with or without an extension of time to file, will be subject to the following late payment penalty and interest payments:

1. A five percent penalty for late payment of any tax balance (see N.J.S.A. 54:49-4);

2. Interest on the unpaid tax calculated at the following rates:

i. For periods ending on and after July 1, 1993, at three percentage points above the prime rate. Interest is imposed for each month (or a fraction thereof) on the unpaid balance of tax. At the end of each calendar year all tax, penalties, and interest remaining due will become part of the unpaid balance on which interest will be charged.

(g) A partnership which, pursuant to N.J.S.A. 54A:8-6(b), is required to file Form NJ-1065 may obtain an automatic extension of time to file by attaching a copy of the Federal application of time to file Federal Form 1065 (Federal Form 7004) to Form NJ-1065, when filed. If the partnership did not apply for a Federal extension of time to file Federal Form 1065, the partnership must submit Federal Form 7004 to the New Jersey Division of Taxation on or before the due date of Form NJ-1065.

Repeal and New Rule, R.1996 d.20, effective January 2, 1996.

See: 27 N.J.R. 3136(a), 28 N.J.R. 176(b).

Repealed former section 1.18, "Extension of time to file New Jersey gross income tax return".

Recodified from N.J.A.C. 18:35-1.18 by R.1998 d.195, effective April 20, 1998.

See: 30 N.J.R. 612(a), 30 N.J.R. 1428(a).

Amended by R.2006 d.155, effective May 1, 2006.

See: 38 N.J.R. 110(a), 38 N.J.R. 1859(b).

Amended the extension of time to file from four to six months; deleted (c); recodified (d) through (h) as (c) through (g) and made appropriate internal reference changes in (d) and (e)3; in (c)1, removed "either" and "or additional two month"; in (f), deleted 2i and ii and recodified iii as i; in (g), substituted "Federal Form 7004" for "Federal Forms 8736 or 8800" and "7004" for "8736 or 8800".

Law Review and Journal Commentaries

Tax Law. Robert J. Alter, Jay A. Soled, 138 N.J.L.J. No. 1, S64 (1994).

Case Notes

Penalties and interest; interest extension request denied due to failure to satisfy condition that 80% of income tax due be paid. Patel v. Director, Div. of Taxation, 13 N.J.Tax 509 (1993).

18:35-6.2 Combat zone; extension of time to file and pay

(a) Members of the Armed Forces of the United States and civilians providing support to the Armed Forces who are serving in a designated combat zone or were hospitalized outside the United States as a result of an injury received while serving in a combat zone are granted an extension of time for filing individual income tax returns and paying tax for the period of combat service or hospitalization, plus 180 days. This extension is also granted to such a taxpayer's spouse who files jointly. No penalty, interest or addition to tax will be assessed for late filing or late payment of the tax pursuant to this subsection (a).

(b) Taxpayers who file individual income tax returns and pay gross income tax late should attach a statement to the return which indicates their qualification for the tax relief granted pursuant to (a) above. The Director may request supporting information.

Emergency New Rule, R.1991 d.166, effective February 27, 1991 (Expires April 28, 1991).

See: 23 N.J.R. 908(a).

Adopted Concurrent Proposal, R.1991 d.273, effective June 3, 1991.

See: 23 N.J.R. 908(a), 23 N.J.R. 1806(a).

Provisions of emergency new rule R.1991 d.166 readopted without change.

Recodified from N.J.A.C. 18:35-1.26 by R.1998 d.195, effective April 20, 1998.

See: 30 N.J.R. 612(a), 30 N.J.R. 1428(a).

18:35-6.3 Signatures required on gross income tax return

(a) Each return shall carry a signature by the taxpayer certifying that all statements contained therein are true, under the same penalties as for perjury committed.

(b) A taxpayer or tax return preparer who electronically transmits an income tax return, or other information required or permitted to be filed with the Division for purposes of the New Jersey Gross Income Tax Act, via the NJ TeleFile or WebFile systems shall be presented with the following statement: "New Jersey law requires that all income tax returns be signed before they are submitted." This statement will be followed with instructions prompting the taxpayer or tax return preparer as to the manner in which the taxpayer or tax preparer may satisfy this requirement via telephone or web-based medium.

(c) A taxpayer who wishes to transmit the return through electronic filing using the Federal/State e-file For Tax Professionals must satisfy the signature requirement in the manner prescribed by the Director.

R.1982 d.258, effective August 16, 1982.

See: 14 N.J.R. 332(a), 14 N.J.R. 921(b).

Repealed by R.1988 d.299, effective July 5, 1988.

See: 20 N.J.R. 514(a), 20 N.J.R. 1571(a).

This section was "Exclusion of interest income on All-Savers Certificates".

New Rule, R.1997 d.406, effective October 6, 1997.

See: 29 N.J.R. 2808(a), 29 N.J.R. 4339(a).

Recodified from N.J.A.C. 18:35-1.16 by R.1998 d.195, effective April 20, 1998.

See: 30 N.J.R. 612(a), 30 N.J.R. 1428(a).

Amended by R.2000 d.246, effective June 19, 2000.

See: 32 N.J.R. 1153(a), 32 N.J.R. 2258(c).

Rewrote (c) through (f).

Amended by R.2005 d.444, effective December 19, 2005.

See: 37 N.J.R. 429(a), 37 N.J.R. 5052(a).

Rewrote the section.

18:35-6.4 Electronic filing methods

(a) A taxpayer or tax return preparer may transmit electronically any income tax return or other information required or permitted to be filed with the Division for the purposes of the Gross Income Tax Act. Electronic transmissions

may be made using applications provided by the Division, including the Division's telephonic application, NJTeleFile, and the Division's web-based application, NJWebFile, the Federally-approved electronic filing application known as Federal/State e-file For Tax Professionals or through any other electronic method made available by the Division or approved by the Division.

(b) Beginning with the 2004 taxable year, tax preparers that prepared or filed 200 or more individual gross income tax resident returns for the prior taxable year must use electronic methods for filing individual gross income tax resident returns and may pay the tax on behalf of the taxpayer in accordance with instructions published by the Director for all the returns prepared or filed by the preparer, subject to such exceptions as the Director determines are reasonable. As a result of changes in technology, the Director shall determine which electronic methods of filing returns and paying tax satisfy the requirements imposed in this section.

(c) For the 2006 taxable year, preparers that have prepared or filed 100 or more individual gross income tax resident returns for the prior taxable year must use electronic methods for filing individual gross income tax resident returns and may pay the tax on behalf of the taxpayer in accordance with instructions published by the Director for all the returns prepared or filed by the preparer, subject to such exceptions as the Director determines are reasonable. As a result of changes in technology, the Director shall determine which electronic methods of filing returns and paying tax satisfy the requirements imposed in this section.

(d) For the 2007 and later taxable years, preparers that have prepared or filed 50 or more individual gross income tax resident returns for a prior taxable year must use electronic methods for filing individual gross income tax resident returns and may pay the tax on behalf of the taxpayer in accordance with instructions published by the Director for all the returns prepared or filed by the preparer, subject to such exceptions as the Director determines are reasonable. As a result of changes in technology, the Director shall determine which electronic methods of filing returns and paying tax satisfy the requirements imposed in this section.

(e) As used in this section, "tax preparer" means any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax or claim for refund under Title 54 or Title 54A of the New Jersey Statutes.

(f) If (b), (c), and/or (d) above are applicable to a tax preparer, and if a taxpayer chooses not to have his or her return electronically filed by his or her tax preparer, both the taxpayer and the preparer must complete an E-File Opt Out Request Form (NJ-1040-O). The tax preparer is required to keep the completed and signed E-File Opt Out Request Form in his or her files and available for inspection by a representative of the New Jersey Division of Taxation.

New Rule by R.2005 d.444, effective December 19, 2005.

See: 37 N.J.R. 429(a), 37 N.J.R. 5052(a).

Amended by R.2007 d.9, effective January 2, 2007.

See: 38 N.J.R. 3760(a), 39 N.J.R. 107(b).

In (b), substituted "200 or more" for "more than 200"; in (c), substituted "100 or more" for "more than 100"; and in (d), substituted "50 or more" for "more than 50".

the relationship between him and the person for whom he performs such services is the legal relationship of employer and employee. The term also includes officers and employees, whether elected or appointed, of the United States, a state, territory, Puerto Rico, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing.

SUBCHAPTER 7. WITHHOLDING AND REPORTING OF TAX

18:35-7.1 Employee defined

(a) For the purposes of N.J.A.C. 18:35-7.2, the term "employee" means every individual performing services if

(b) When determining whether an individual is in an employer-employee relationship, relevant factors shall be considered, including the following:

deducted can reasonably be expected to be \$18,000 or more for a semiannual period, a seasonal employer shall file semi-monthly employer returns with payment of the taxes withheld as provided under this section. If no tax was withheld during a particular month, a return is still required to be filed for such month with the reason for nonwithholding stated on the back, the date of the last payment of wages, and the date when the employer expects to resume paying taxes.

Recodified from N.J.A.C. 18:35-1.10 and amended by R.1998 d.195, effective April 20, 1998.

See: 30 N.J.R. 612(a), 30 N.J.R. 1428(a).

In (h), changed N.J.A.C. reference.

Amended by R.2006 d.327, effective September 18, 2006.

See: 38 N.J.R. 2402(a), 38 N.J.R. 3919(a).

Recodified (e) through (h) as (g) through (j); and added new (e) and (f).

18:35-7.4 Summer payment plan

(a) Certain deferred payments, authorized under a so-called "summer payment plan" under N.J.S.A. 18A:29-3, whereby an amount equal to ten percent of the employee's salary is withheld and paid to the participant in the plan at a later date are subject to tax under the New Jersey Gross Income Tax Law, P.L. 1976, c.47 (N.J.S.A. 54A:1-1 et seq.), at the time withheld and not at the time paid, provided that a similar treatment is given under the Internal Revenue Code and regulations thereunder for Federal income tax purposes.

(b) Section 54A:8-3 of the New Jersey Gross Income Tax Act, P.L. 1976, c.47 (N.J.S.A. 54A:8-3), provides that a taxpayer's accounting method under this Act shall be the same as his accounting method for Federal income tax purposes. Therefore, if for Federal income tax purposes an employee who participates in such a deferral plan is deemed to have received the salary at the time that the salary was withheld and placed into a deferred salary escrow fund, such income will also be deemed to have been received and subject to tax for New Jersey gross income tax purposes at that time. Such salary would not then be subject to New Jersey gross income tax when the employee receives a payment from the deferred salary escrow fund.

R.1976 d.415, effective December 16, 1976.

See: 9 N.J.R. 52(a).

Recodified from N.J.A.C. 18:35-1.1 by R.1998 d.195, effective April 20, 1998.

See: 30 N.J.R. 612(a), 30 N.J.R. 1428(a).

18:35-7.5 Gambling winnings subject to withholding

(a) Every payor of New Jersey gambling winnings which are subject to withholding, as defined in (d) below, shall deduct and withhold New Jersey gross income tax thereon in an amount equal to three percent of payments made to both New Jersey residents and nonresidents as defined in N.J.S.A. 54A:1-2(m) and (n). Such withholding shall be required in all instances wherein the payor of such winnings is required to withhold for Federal income tax purposes under subsection (q) of section 3402 of the Federal Internal Revenue Code of 1986 (26 U.S.C. § 3402), as amended.

(b) The tax imposed under N.J.S.A. 54A:7-1(c) and this section shall not apply:

1. With respect to the payment of winnings from the New Jersey Lottery; and
2. With respect to a payment of winnings from a slot machine, or a keno or bingo game.

(c) Any person receiving a payment of New Jersey gambling winnings subject to withholding must furnish the payor a statement made under the penalties of perjury containing:

1. The name, address, and taxpayer identification (social security) number of the winner accompanied by a declaration that no other person is entitled to any portion of such payment; or
2. The name, address, and taxpayer identification (social security) number of the recipient and of every person entitled to any portion of such payment.
3. The requirement set forth in (c)1 and 2 above may be satisfied by providing the payor with a copy of Federal Form W-2G or 5754, whichever is applicable.

(d) New Jersey gambling winnings subject to withholding means any payment from:

1. A wager placed in a sweepstakes, wagering pool or lottery, other than the New Jersey Lottery, but only if the proceeds from the wager exceed \$1,000; or
2. Any other wagering transaction, including but not limited to, a wagering transaction in a parimutuel pool with respect to horse races, but only if the proceeds from the wager:
 - i. Exceed \$1,000; and
 - ii. Are at least 300 times as large as the amount of the wager.
3. If proceeds from a wager as set forth in (d)1 and 2 above qualify as winnings subject to withholding, then the total proceeds from the wager, and not merely amounts in excess of \$1,000, are subject to withholding.

(e) Proceeds from a wager is the amount paid with respect to a wager, less the amount of the wager. Amounts paid with respect to identical wagers are treated as paid with respect to a single wager for purposes of calculating the amount of proceeds from a wager.

1. In determining the amount paid with respect to a wager, proceeds which are not money shall be taken into account at the fair market value.
2. Periodic payments, including installment payments or payments which are to be made periodically for the life of a person, are aggregated for purposes of determining the proceeds from a wager. The aggregate amount of period payments to be made for a person's life shall be based on the person's life expectancy. For purposes of determining

the amount subject to withholding, the first periodic payment shall be reduced by the amount of the wager.

(f) Payments to any person of winnings subject to withholding under this section shall be treated as if they are wages paid by an employer to an employee under the provisions of N.J.S.A. 54A:7-2 through N.J.S.A. 54A:7-7; provided, however, that such payments shall be considered gambling winnings for all other purposes under the Gross Income Tax Act (N.J.S.A. 54A:1-1 et seq.).

New Rule, R.1988 d.407, effective September 6, 1988.

See: 19 N.J.R. 2255(a), 20 N.J.R. 2310(c).

Recodified from N.J.A.C. 18:35-1.20 by R.1998 d.195, effective April 20, 1998.

See: 30 N.J.R. 612(a), 30 N.J.R. 1428(a).

18:35-7.6 Filing of withholding returns by professional athletic teams

Any "professional athletic team" (as defined by N.J.A.C. 18:35-5.1(b)1) which pays compensation to a resident or nonresident individual for services rendered to the team within New Jersey shall be deemed to be an "employer" and shall be required to withhold New Jersey gross income tax return from that portion of the compensation attributable to "duty days" spent in New Jersey, as defined in N.J.A.C. 18:35-5.1(b)3.

Recodified from N.J.A.C. 18:35-1.22(c) and amended by R.1998 d.195, effective April 20, 1998.

See: 30 N.J.R. 612(a), 30 N.J.R. 1428(a).

Changed N.J.A.C. references.

18:35-7.7 Commuter transportation benefits reporting by employer

(a) Pursuant to N.J.S.A. 54A:7-2, an employer shall provide an employee with a written statement as prescribed by the Director in (g) below showing the cost of commuter transportation benefits paid by the employer to the employee.

(b) Employer-provided commuter transportation benefits for using an alternate form of commuting (such as public transportation, carpools, etc.) are excluded from New Jersey gross income up to and including the limit per taxable year per employee. The limit per taxable year is as follows:

1. \$720.00 for the taxable years beginning on and after January 1, 1993 but before January 1, 1994;
2. \$735.00 for the taxable years beginning on and after January 1, 1994 but before January 1, 1995;
3. \$735.00 for the taxable years beginning on and after January 1, 1995 but before January 1, 1996;
4. \$755.00 for the taxable years beginning on and after January 1, 1996 but before January 1, 1997;
5. \$1,000 for the taxable years beginning on and after January 1, 1997 but before January 1, 1998;

6. \$1,105 for the taxable years beginning on and after January 1, 1998 but before January 1, 1999;

7. \$1,120 for the taxable years beginning on and after January 1, 1999 but before January 1, 2000;

8. \$1,145 for the taxable years beginning on and after January 1, 2000 but before January 1, 2001;

9. \$1,175 for the taxable years beginning on and after January 1, 2001 but before January 1, 2002;

10. \$1,200 for the taxable years beginning on and after January 1, 2002; and

11. In the case of any taxable year beginning in a calendar year after 2002, the Director shall adjust the limit for inflation in parallel with the adjustment pursuant to paragraph (6) of subsection (f) of section 132 of the Federal Internal Revenue Code of 1986, 26 U.S.C. § 132, so that the taxable year limit pursuant to this paragraph is equal to 12 times the adjusted Federal monthly limit pursuant to subparagraph (A) of paragraph (2) of subsection (f) of section 132 of the Federal Internal Revenue Code of 1986.

(c) The income tax exclusion shall not apply to any commuter transportation benefit unless such benefit is provided in addition to and not in lieu of any compensation otherwise payable to the employee.

(d) State and local government employers may offer qualified transportation fringe benefits to their own employees as an employee set-aside program. The State and local employees shall choose to have the benefit deducted from their salary, receive any combination of benefits or continue to receive the amount as salary. The amount of any reduction will continue to be treated as regular compensation including the calculation of pension contributions and the amount of any retirement allowance, but, to the extent permitted under the Federal Internal Revenue Code as extended under the Federal Transportation Equity Act for the 21st Century (Title IX of Pub.L. 105-178), will not be included in the computation of Federal taxes withheld from the employee's salary.

(e) Qualified parking, as provided under IRC Section 132, at or near the employer's business premises or a location from which the employee commutes to work by mass transit or hired commuter vehicle is excludible for New Jersey gross income tax purposes. Commuter transportation benefits also includes the cost of parking by employees at park-and-ride lots. Any parking on or near the employer's residence is not qualified parking.

1. Acceptance of the cash value of qualified parking on the part of one employee of an employer in place of qualified parking fringe benefits provided to the other employees of the employer in addition to and not in lieu of compensation, shall not cause the qualified parking fringe

to become a taxable benefit for employees who did not accept the cash value.

(f) Notice of the adjusted limit shall be published in the New Jersey Register.

(g) The written statement required to be provided by the employer to the employee as set forth in (a) above may be set forth on a W-2 form or other written information statement showing the amount of such benefits.

New Rule, R.1995 d.19, effective January 3, 1995.
See: 26 N.J.R. 4173(a), 27 N.J.R. 143(a).

SUBCHAPTER 11. FILING FEE PAYMENTS BY PARTNERSHIPS

Authority

P.L. 2002, c.40, § 25, N.J.S.A. 54:10A-27, 54A:9-17(a) and 54:50-1.

Source and Effective Date

R.2003 d.370, effective August 22, 2003.
See: 35 N.J.R. 1573(a), 35 N.J.R. 4310(a).

Subchapter Expiration Date

Subchapter 11, Filing Fee Payments by Partnership, expires on June 20, 2008.

Subchapter Historical Note

Subchapter 11, Filing Fee Payments by Partnerships, was adopted as Special Adopted and Concurrent Proposed New Rules by R.2003 d.135, effective February 17, 2003 (to expire August 26, 2003). See: 35 N.J.R. 1573(a).

The concurrent proposal of Subchapter 11, Filing Fee Payments by Partnerships, was adopted by R.2003 d.370, effective August 22, 2003. See: Source and Effective Date. See, also, section annotations.

18:35-11.1 Definitions

For the purposes of this subchapter only, the following terms shall have the following meanings:

“Common trust fund” means a fund maintained by a bank, which fund is subject to Internal Revenue Code Section 584 and which is free from New Jersey taxation pursuant to N.J.S.A. 17:9A-44.

“Income” means income, loss, gain, or expense.

“Partner” means, and includes without necessarily being limited thereto, each entity that receives a K-1 or NJ-K1 from a partnership.

“Partnership” means any entity classified as a partnership for Federal income tax purposes. The term includes, but is not limited to, a general partnership, a limited liability partnership, a limited partnership, a family limited partnership, and a limited liability company. The term includes partnerships whose members receive nontaxable income pursuant to N.J.S.A. 54A:5-8(c), commonly referred to as hedge funds and qualified investment partnerships as defined in N.J.S.A. 54:10A-4(r). However, the term does not include investment clubs or common trust funds.

“Investment club” means an entity that is classified as a partnership for Federal income tax purposes and, all of whose owners are individuals. All of the entity’s assets must be securities, cash, or cash equivalents, and its assets must be valued on a consistent basis at the lower of cost or fair market value. In calculating assets for a privilege period, a quarterly average must be used, and the total value must be less than \$60,000. See also N.J.A.C. 18:35-1.3. To illustrate, an investment club is formed when a group of friends,

neighbors, business associates, or others pool their money to invest in stock or other securities. The club may or may not have a written agreement, a charter, or bylaws.

Usually the group operates informally, with members pledging to pay a regular amount into the club, monthly. Some clubs have a committee that gathers information on securities, selects the most promising securities, and recommends that the club invest in them. Other clubs rotate these responsibilities among all their members. Most clubs require all members to vote for or against all investments, sales, trades, and other transactions.

18:35-11.2 Apportionment of the partnership fee

(a) For privilege periods beginning on or after January 1, 2002 each partnership, regardless of any Internal Revenue Code 761(a) election, having income derived from New Jersey sources that has more than two owners shall make a payment of a filing fee of \$150.00 for each owner of an interest in the entity, provided that the payment shall not exceed \$250,000.

(b) If a partnership includes nonresident partners, some of whom have physical nexus with New Jersey and some of whom do not, then an apportionment methodology for the partnership filing fee may be used, provided that the partnership has an office outside New Jersey.

(c) The total apportioned partnership fee is equal to the sum of:

1. The number of resident partners multiplied by \$150.00; plus
2. The number of nonresident partners with physical nexus to New Jersey multiplied by \$150.00; plus
3. The number of nonresident partners without physical nexus to New Jersey multiplied by \$150.00 and the resulting product multiplied by the corporate allocation factor of the partnership.
 - i. The corporate allocation factor includes property, payroll and double weighted receipts fractions.
 - ii. For purposes of this section only, if one or both of the fractions are missing in the allocation factor, or if a partnership is unable to allocate because it lacks an office outside the State, the partnership may allocate its nonresident partners without nexus using the receipts fraction only.

Amended by R.2003 d.370, effective September 15, 2003.
See: 35 N.J.R. 1573(a), 35 N.J.R. 4310(a).
Added (c)3ii.

18:35-11.3 Annual return; payment of tax or fee due; extensions of time to file tentative return; estimated payment

(a) A partnership having a resident New Jersey owner of an interest in the entity or having any income derived from

New Jersey sources is required to file a partnership return Form NJ-1065 on or before the 15th day of the fourth month after the end of the tax year. See N.J.A.C. 18:35-1.3.

(b) Any partnership having a liability for a filing fee payment pursuant to N.J.S.A. 54A:8-6 or having tax due pursuant to N.J.S.A. 54:10A-15.11 must file Form PART-100, "Partnership Return Voucher," and Form NJ-1065. The applicable payment must accompany Form PART-100. Form PART-100 must be postmarked on or before the original due date for the return.

(c) A partnership seeking an extension of time to file NJ-1065 may file a copy of its application for a Federal extension with its New Jersey return. The box at the top of Form NJ-1065 labeled "Application for Federal Extension is attached" shall be checked. If a Federal extension has not been obtained, a request for a State extension may be made by filing Federal Form 8736 or 8800 with the Division of Revenue on or before the due date of the State return. In addition, Form Part 200 T, "Partnership Tentative Return and Application for Extension of Time to File," must be postmarked on or before the original due date of the return. An extension of time to file Form NJ-1065 does not extend the time to pay the filing fee or tax due. It also does not extend the time for filing the tax return or returns of the partners.

18:35-11.4 Installment payment

(a) Each entity required to make a payment of the partnership filing fee shall, on or before the 15th day of the fourth month of its fiscal year, make an installment payment of its filing fee for the succeeding return period. The amount of the installment payment is 50 percent of the amount required to be paid for the current fiscal year.

(b) In the year a partnership dissolves a 50 percent repayment of the filing fee liability for the succeeding year is not required.

1. For example, if a partnership having a taxable year beginning on or after January 1, 2002 dissolves during the calendar year 2002, the 50 percent prepayment of the \$150.00 per partner filing fee for the 2003 year is not required, provided the partnership properly marks its 2002 Form NJ-1065 signifying it is a final return.

18:35-11.5 Penalty and interest

For purposes of tax administration, tax and filing fees are payments subject to the provisions of the State Uniform Tax Procedure Law, N.J.S.A. 54:48-1 et seq. Unless such provisions are superceded by specific sections of the Gross Income Tax Act such as N.J.S.A. 54A:9-5 and 54A:9-6, collection of the tax and filing fee shall be enforced pursuant to the terms of that Act, including, without limitation thereto, penalty and interest and cost of collection provisions.

18:35-11.6 Partnership examples of the imposition of the filing fee

(a) The following are examples of the application of the filing fee to a variety of situations.

Example 1: A limited partnership operates a profitable shopping center in Middlesex County, New Jersey. It has 20 partners. All reside in New Jersey. The partnership is liable for a partnership filing fee of \$3,000 (20 x \$150.00) plus an installment payment of 50 percent of the current year's fee (\$1,500) for the succeeding year.

Example 2: A Connecticut partnership with an office in New Haven sells small tables. Ten partners reside in New Jersey and ten reside in Connecticut. The New Jersey customers of the business purchase \$200,000 worth of tables per year. Four Connecticut partners remain outside New Jersey, but six Connecticut resident partners work in the partnership's New Jersey office.

Since the partnership includes nonresident partners, the apportionment methodology for the partnership filing fee may be used. The partnership's allocation factor is assumed to be 0.4.

The fee is calculated as follows:

The number of New Jersey resident partners is multiplied by \$150.00.

$$10 \times \$150.00 = \$1,500$$

The number of nonresident partners with physical nexus with New Jersey multiplied by \$150.00.

$$6 \times \$150.00 = \$900.00$$

The number of nonresident partners without physical nexus to New Jersey is multiplied by \$150.00 and the result is multiplied by the allocation factor.

$$4 \times \$150.00 = \$600.00$$

$$\$600.00 \times 0.4 = \$240.00$$

The total fee for 2002 is:

$$\$1,500 + \$900.00 + \$240.00 = \$2,640$$

The prepayment for 2003 is

$$\$2,640 \times 50 \text{ percent} = \$1,320$$

Example 3: A limited partnership, East, L.P., is organized and has an office in New Jersey. It has 10 limited partners and two general partners. One of the limited partners is a California limited partnership, West, L.P., having 15 partners all of whom are based in an office in Los Angeles. Certain property belonging to West, L.P., is stored at East, L.P.'s office in New Jersey. The Los Angeles limited partnership received a \$1,000,000 distribution in 2002 from the New Jersey partnership. West, L.P.'s apportionment formula is 10 percent or 0.1.

First, in 2002 the New Jersey partnership pays a fee of (12 x \$150.00) \$1,800 for 2002 since all its partners had a presence in New Jersey plus a prepayment of \$900.00 (50 percent x \$1,800) for 2003.

Second, since the California partnership derives income from New Jersey, it is also responsible for the partnership fee. Its fee is calculated as follows:

0 Resident partners = \$0

0 Non-resident partners with physical nexus = \$0

15 Non-resident partners without physical nexus to New Jersey

$$15 \times \$150.00 = \$2,250$$

\$2,250 x 0.1 = \$225.00 which is the fee for the California partnership.

Example 4: A family limited partnership is organized so that two general partners receive K-1s and two limited partners that receive no income from the partnership do not receive K-1s.

The partnership fee is 4 x \$150.00. There are four owners of the partnership and the partnership directory discloses them as such. The fact that two partners do not receive K-1s is not material, and they are still counted toward the fee total since they are also owners of the partnership.